

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMAN P. ROMERO and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, CAMINO REAL RANGER DISTRICT, Peñasco, NM

*Docket No. 98-1260; Submitted on the Record;
Issued April 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his actual earnings as a part-time forestry aid.

On June 29, 1995 appellant, a temporary full-time seasonal forestry technician (firefighter), sustained an injury while in the performance of his duties. The Office accepted his claim for the condition of right knee sprain and authorized arthroscopy. Appellant received compensation for temporary total disability on the periodic rolls.

Appellant returned to work on August 26, 1996 as a temporary part-time forestry aid not to exceed 90 days.

In a decision dated November 26, 1996, the Office reduced appellant's compensation based on his actual earnings as part-time forestry aid. In a decision dated December 3, 1997, an Office hearing representative affirmed the reduction of compensation.

The Board finds that the Office improperly reduced appellant's compensation based on his actual earnings as a part-time forestry aid.

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and

reasonably represent the employee's wage-earning capacity.¹ The Office's procedure manual provides in relevant part as follows:

"Factors Considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or
- (3) *The job is temporary* where the claimant's previous job was permanent."²

The Office of Personnel Management (OPM) recognizes four kinds of appointments: (1) career; (2) career condition (essentially a probationary period); (3) term (not to exceed four years, and with no career status); and (4) temporary (not to exceed one year, with a one-year extension possible, and with no career status).³ In the present case, appellant's date-of-injury position as a firefighter and his subsequent reemployment as a forestry aid were both temporary appointments and therefore "at least equivalent" for purposes of determining wage-earning capacity based on actual earnings.

The OPM also recognizes five kinds of tours of duty: (1) full time (40 hours per week); (2) part time (16 to 32 hours per week); (3) intermittent (no regularly scheduled hours); (4) seasonal (less than 12 months per year, with either a full time, part time or intermittent schedule); and (5) on call (usually at least six months per year on an as-needed basis, with either

¹ See 5 U.S.C. § 8115(a) (providing that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the employee's wage-earning capacity).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997). (Emphasis in the original.)

³ *Id.*, *Determining Pay Rates*, Chapter 2.900.3(a)(1) (December 1995).

a full-time or part-time schedule).⁴ In the present case, appellant's date-of-injury position as a firefighter carried a full-time seasonal tour of duty. His subsequent reemployment as a forestry aid, however, was merely part time. Because Office procedures for determining wage-earning capacity based on actual earnings require that the tour of duty be at least equivalent to that of the job held on the date of injury, and because the record fails to show that the tours of duty in the present case were at least equivalent, the Office improperly reduced appellant's compensation based on his capacity to earn actual wages as a part-time forestry aid.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ The Office has not met its burden.

The December 3, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
April 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁴ *Id*, Chapter 2.900.3(a)(2).

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).